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PROTECTION OF MINORITIES

Working Paper

containing suggestions for a comprehensive programme for the prevention of discrimination and protection of minorities

prepared by Mr. Asbjørn Eide pursuant to Sub-Commission resolution 1993/43 of 26 August 1993

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I. MANDATE AND BACKGROUND

1. In its resolution 1993/43, the Sub-Commission entrusted Mr. Asbjørn Eide with the task of preparing, without financial implications, a working paper containing suggestions for a comprehensive programme for the prevention of discrimination and protection of minorities. This decision was endorsed by the Commission on Human Rights in its resolution 1994/22 of 1 March 1994.

2. The purpose of this brief working paper is to provide a basis for a discussion of the role which can be played in the coming year by the Sub-Commission in handling the core of its mandate, which is the prevention of discrimination and protection of minorities. It will be argued here that there is a close relationship, but also a very difficult balance to be drawn, between the two tasks.

3. In examining its potential role, it is necessary to recognize that we are going through a period of convulsive change, which in some places, is even challenging the basic elements of international order. The integrity and stability of States is under threat. Undoubtedly, new possibilities and hopes have arisen during the last three or four years. However, new and very serious challenges have also emerged, threatening international and domestic order, and thereby also respect for human rights.

4. Some of the positive developments as well as some of the new challenges fall squarely within the mandate of the Sub-Commission and will have a significant impact on its future work. On the positive side is the remarkable transition which has taken place in South Africa, and a hopeful process has also been started in the relationship between Israel and the Palestinians. The situation which has arisen during the last three or four years, however, has also been a harbinger of new and serious dangers. Aggravated, new forms of discrimination have emerged, going far beyond discrimination in jobs and housing.

5. What can now be observed is massive ethnic cleansing and massacres, bordering on genocide, and huge flows of refugees and internally displaced persons. Some approaches and attitudes have been demonstrated which constitute a head-on challenge to the very foundation of human rights, a challenge to the principle of equality and non-discrimination irrespective of colour, race, ethnic or national background.

6. The Sub-Commission can take pride in its past contributions to the elimination of racism. Through its study programme and in many other ways it has contributed significantly to the development of international instruments aimed at the elimination of racism. It was responsible for the preliminary drafting of the United Nations Declaration and later the International Convention on the Elimination of All Forms of Racial Discrimination, which were adopted by the General Assembly, the first in 1963 and the second in 1965. It had the same role to play in the preparation of the Declaration on Religious Intolerance, the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, proclaimed by the General Assembly in 1981. The Sub-Commission prepared the ground through its study programme, for the adoption of instruments regarding the prevention of discrimination in

the area of education, in political rights, and on equality in the administration of justice.

7. Of particular significance has been the contribution made by the Sub-Commission in mobilizing action against apartheid, particularly through the report on the adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to the colonial and racist regimes of southern Africa, followed by the annual listing of banks, transnational corporations and other organizations assisting the colonial and racist regimes in southern Africa. Undoubtedly, this activity, led by Mr. Ahmed Khalifa, significantly contributed to the weakening of the apartheid system.

8. Another area in which the Sub-Commission can take great pride, is the work concerning the prevention of discrimination against indigenous peoples. The comprehensive study prepared by Mr. Martinez Cobo, assisted by Mr. Augosto Willemson Diaz, was a monumental work mapping the situation of indigenous peoples all over the world. This was followed by the establishment and the activities of the Working Group in the Rights of Indigenous Peoples which, under the chairmanship of Mrs. Erica-Irene Daes, completed the draft declaration on that subject in 1993 which is before the Sub-Commission at this session.

9. The Sub-Commission has also endeavoured, albeit with somewhat less success, to secure adequate protection for members of minorities. A significant contribution by the Sub-Commission was the path-breaking study by Mr. Francesco Capotorti in the 1970s. One of the follow-up activities was the initiation of the drafting, by the Commission on Human Rights, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in 1992.

II. NEW CHALLENGES

10. Notwithstanding its past successes, the Sub-Commission should analyse new phenomena which have the effect of racial or ethnic discrimination, even when the actors avoid the language or symbols of the discredited racist mythology.

11. Two related phenomena can at present be observed in many parts of the world: the language, ideology and actions of xenophobia; and the language, symbols and in particular actions of ethno-nationalism. The combination of these two is an explosive mix. They have an element in common: the dogmatic assertion of the desirability of ethnically or culturally homogeneous societies, leading to a rejection of those who are different or to their being deprived of the possibility of asserting their own identity as members of the group concerned.

12. In some places, more or less enforced policies of assimilation can be observed, which are bad enough in that they deny the existence or the identity of national or ethnic, cultural, religious and linguistic minorities. In other places, there is outright ethnic "cleansing", through massacres and unspeakable crimes.

13. Xenophobia is in many places manifested against migrant workers. At present, the main authors of violence against migrants are marginal elements in society, unemployed, young, frustrated and angry. It should not be precluded, however, that their frustrations can be exploited by cynical but skilful political entrepreneurs wanting to make use of their irrational sentiments for purposes of political gain.

14. It has been argued that in many parts of the world there is a movement towards anarchy. 1/ There are dangers in many places of a violent disintegration of society, a situation comparable to that experienced in many parts of Europe in the 15th and 16th centuries as wars of everybody against everybody else, prior to the emergence of the organized State system and the introduction of human rights.

15. Some of the events at present being observed might be seen as blind and irrational violence between members of groups. It is becoming increasingly clear, however, that in most cases such violence is initiated by what can be called conflict entrepreneurs, persons who have their own political agenda and who, to further their own quest for power, make use of feelings of demographic stress and personal insecurity among the public at large. If this observation is correct, it is incumbent on the international community to help responsible Governments, as well as responsible representatives of the various groups concerned, to find peaceful and constructive solutions to their concerns without physical violence and without violating international or national law.

16. Human rights and fundamental freedoms require the existence of a legal order which can ensure equality and reciprocal respect between all members of society. A functioning legal order can only be ensured by the existence of States, which constitute the framework for legal systems, but this in turn requires a proper construction and implementation of the legal system in conformity with human rights. Thus, the task is to ensure the existence of a legal order and its effective application without the use of authoritarian methods which deny freedoms and human rights.

17. The State must be seen as legitimate by all members of society, which not only requires equality in participation, but also respect for minority groups. On the other hand, minorities must equally respect the common legal order in society, and the human rights of the majorities.

III. RE-EMPHASIZING THE ORIGINAL MANDATE OF THE SUB-COMMISSION

18. In the light of these challenges, the Sub-Commission should take seriously its dual mandate of prevention of discrimination and protection of minorities, and recognize the relationship between the two. The Sub-Commission at its very outset 2/ defined prevention of discrimination as the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish. It has defined the protection of minorities as the protection of non-dominant groups which while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they may possess and which distinguish them from the majority of the population.

19. Prevention of discrimination is essential, but not always sufficient. It must include a concern with equality in fact, including equality for the members of the different groups in society in maintaining their own culture, religion and identity. On the other hand, recognition of the identity of different groups does not mean a right for members of these groups to dismember the State or destroy the fabric of the multi-cultural society. The conflict entrepreneurs, whether they are ethno-nationalists (mainly in Europe) or ethnic contenders (mainly in Africa) must not be encouraged, but dissuaded.

20. Consequently, there is a need for a comprehensive approach, based on international law, as derived from the Charter of the United Nations, including the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, and on international human rights law in general.

21. The Sub-Commission should take into account the tasks set for the Third Decade to Combat Racism and Racial Discrimination, proclaimed by the General Assembly in resolution 48/91 of 20 December 1993, and identify the areas in which it can best make its own contributions to the Decade. Many delegations to the General Assembly have voiced concern with regard to new expressions of racism, racial discrimination, intolerance and xenophobia in various parts of the world, and that these in particular affect minorities, ethnic groups, migrant workers, indigenous populations, nomads, immigrants and refugees.

IV. THE BASIS FOR ACTION BY THE SUB-COMMISSION

22. The present working paper builds on previous work, in particular on the study on possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities (E/CN.4/Sub.2/1993/34 and Add.1-4). The present working paper should be read in conjunction with the recommendations contained in Addendum 4 to that report.

23. The first task of the Sub-Commission should be to clarify and emphasize the guidelines drawn from contemporary international law, including human rights law, without which all efforts at peacemaking are ad hoc and to some extent arbitrary.

24. The basic foundation of international law is respect for the territorial integrity of existing, sovereign States. The principle of self-determination is at present often invoked to challenge that integrity. It needs to be underlined that the right to self-determination does not include a unilateral right to independence, or secession, except in two circumstances: for non-self-governing territories, and for territories under illegal occupation defined as such by the United Nations. This was made clear in the Declaration and Programme of Action of the World Conference on Human Rights, held at Vienna in 1993:

> "In accordance with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this 3/ shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of

sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." (Part I, para. 2.)

25. The next element in the foundation is the need to ensure equality and non-discrimination in the common domain within the national society. This should include effective participation for all in democratic governance. The content of this element of the foundation is spelled out in the International Convention on the Elimination of All Forms of Religious Intolerance.

26. One special problem should here be given attention, in the light of recent developments: the problem of nationality (citizenship) laws and their implementation. Special attention should be given to situations where federations or other large entities have been dissolved into two or more independent States. Whether such States are considered as successor States or as restored States, the needs and the concerns are the same for the human beings who have taken up what was intended to be their permanent residence in that territory in accordance with the law in force when they did so.

27. Since international law is vague on this matter, experts have given conflicting views on how to solve it. It is of great importance that efforts are made, within the context of prevention of discrimination, to establish guidelines for the adoption of nationality laws in such cases. To be a citizen is a requirement for being able to participate in the democratic processes in the country concerned. When deprived of the possibility of voting and of being elected, significant groups have no satisfactory peaceful channel to advance their values and interests, and the risk is then high that their frustration may lead to undesirable forms of action.

28. The third component of the foundation is the need to allow for pluralism in togetherness, in line with the 1992 Declaration on minorities. This is not the place to elaborate on the content of that requirement; it has been spelled out in great detail both in the Capotorti report and in the study on peaceful and constructive solutions to situations involving minorities (E/CN.4/Sub.2/1993/34 and Adds.1-4). It should be noted, however, that the Human Rights Committee has recently adopted a general comment 4/ regarding article 27 of the International Covenant on Civil and Political Rights. It helps to clarify several issues of significance for pluralism and participation by different groups. Firstly, it underlines that the enjoyment of the rights to which article 27 refers does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, the right to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities constituting a minority (General Comment No. 23 (50), para. 3.2).

29. Another important observation in the General Comment is that the persons protected under article 27 as belonging to a minority, do not have to be citizens of the State Party. The rights protected under the Covenant are

applicable to all persons within its territory and subject to its jurisdiction. A state may therefore not restrict the rights under article 27 to citizens (General Comment No. 23 (50), para. 5.1). This is an important observation since past efforts to define citizens have often been restrictive.

30. The General Comment also underlines that the State is obliged, under article 27, to take positive measures of protection for members of minorities, not only protection against the acts of the State but also against the acts of other persons within the territory of the State (General Comment No. 23 (50), para. 6.1)

31. Effective participation by minority groups, and effective enjoyment of their cultural rights, may sometimes require territorial decentralization or local autonomy arrangements. This can be a good device in some circumstances, but can be extremely dangerous in others. If decentralization is to serve a useful purpose, it must be territorial, not ethnic; it must be a contribution to democracy, not ethnocracy. Moves towards territorial subdivision on ethnic grounds raises the dangers of ethnic cleansing, as has been vividly demonstrated in the cases of Bosnia and Herzogovina (where the territorial integrity of that State has been challenged by extremely militant ethnic groups), Abkhazia and South Ossetia (where the challenge to the territorial integrity of Georgia has been accompanied by processes of ethnic cleansing). There are, on the other hand, positive experiences of territorial subdivision which is peacefully negotiated between the parties concerned, which functions well and which is not accompanied by any form of ethnic cleansing. As examples can be mentioned the decentralization which has taken place in Spain or in Belgium. A positive example of territorial decentralization which extends the scope of autonomy for **indigenous** groups, but, on a territorial rather than an ethnic basis, is the case of Greenland. Undoubtedly, there will be others in the future. In its General Comment No. 23, the Human Rights Committee has also underlined that culture can manifest itself in various ways, including a particular way of life associated with the use of land resources, especially in the case of fishing and hunting, and the right to live in reserves protected by law.

32. In so far as cultural rather than territorial issues are involved, these can be better addressed by some form of non-territorial cultural autonomy, which can be combined with territorial but non-ethnic autonomy.

V. AREAS OF ACTION BY THE SUB-COMMISSION

33. It having been recognized that the Sub-Commission is the only expert body which brings together the dual mandate of prevention of discrimination and protection of minorities, the elements in the programme of work should be spelled out. The normative basis has gradually been constructed and exists now in its main outline, consisting in particular of the following elements: the Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the Declaration on the Elimination of All Forms of Intolerance based on Religion

or Belief; and the forthcoming declaration on the rights of indigenous peoples. There are several other instruments, including those adopted by other agencies, such as the UNESCO Convention against Discrimination in Education, and ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

34. Priority attention should be given to the implementation of this normative system in national law, both constitutional and statutory law. The proper combination of provisions concerning equality and non-discrimination, and provisions allowing for conditions to maintain group identity, should be encouraged.

35. Advisory services should be used in this connection, but this requires more comprehensive knowledge and analysis of positive experience in this field. Some of these experiences have been recorded in the study by Mr. Capotorti and in the study prepared by the present writer on peaceful and constructive solutions to situations involving minorities, but more work is required in order for the United Nations to be able to provide satisfactory assistance to Governments in this field.

36. The role of human rights-oriented education is essential. However, appropriate balance in the content of that education must be maintained between the knowledge of one's own rights and respect and protection of the rights of others, including members of different religious and ethnic groups. The principle of tolerance is probably the key element in the whole human rights edifice, and cannot be emphasized enough in human rights education.

37. A society cannot function if there are only rights and no duties. It is incumbent on the State to impose those duties which are necessary in a democratic society in order to preserve and protect the human rights and fundamental freedoms of all members of society, and to protect them not only against the State but also against threats by members of other groups in the same society.

38. **Preventive** functions are equally important. Prevention of conflicts arising from discrimination or from tensions between different ethnic or religious groups requires a continuous dialogue with states on the implementation of the principles contained in the relevant international instruments. This dialogue is facilitated by the monitoring functions carried out by the treaty bodies. Of particular importance here are the activities of the Committee on the Elimination of Racial Discrimination (CERD). In monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee may be able to detect, at an early stage, dangerous developments which require attention. The Sub-Commission should keep itself well informed about the work of CERD, and draw lessons from it in its own effort to elaborate a comprehensive strategy for its dual mandate.

39. There is, however, a need to complement the monitoring function of CERD with comparable monitoring of the rights of persons belonging to minorities - monitoring which should be based on the 1993 Declaration on the rights of minorities. Working groups or special rapporteurs have been set up for monitoring other declarations; so far, this has not been done in regard to

minorities. One possibility is that the Sub-Commission itself undertake this task, by seeking authorization to establish a working group on minorities. Such a working group should then be maintained parallel to the Working Group on Indigenous Peoples, and would be an essential contribution to a more comprehensive handling of mandate of the Sub-Commission.

40. Whichever monitoring system is developed regarding minorities, the important task for the Sub-Commission is to be able to deal with the totality of the questions concerned and to study the interrelationship between the different sets of issues - non-discrimination, racism, ethnic conflict, religious intolerance, xenophobia. On that basis the Sub-Commission may be able to give guidance to the many other bodies, rapporteurs and agencies which deal with separate aspects of the same totality.

41. The Sub-Commission and CERD should encourage States to establish recourse procedures for those who are victims of racial or ethnic discrimination.

42. Under aggravated circumstances, where conflicts are becoming more severe, the use of thematic or country rapporteurs is increasingly being resorted to. It is for the Commission to appoint rapporteurs; the Sub-Commission should give close attention to their reports in so far as questions within its mandate are concerned, and should provide suggestions to the rapporteurs on how they can best address those aspects of their particular mandate.

43. Advisory services can be of great help in times of increasing tension, but before it breaks out into open violence. Through such services, well-intentioned Governments may be able to find even better ways of relating to the various groups in their society, and they may also be able to show that their own policies are in conformity with human rights, whereas those who make allegations concerning discrimination or group rights, in fact are intolerant groups which are opposed to a society base on multicultural co-existence and equality in the common domain.

44. It is essential to underline that many problems emerge not from the Government but from other elements in society: sometimes from ethnic groups, as demonstrated by the Serbs in Bosnia; sometimes by sections of the security forces who pursue their own violent agenda and which the Government is unable to bring fully under control. In much of the human rights discourse at the international level it has been assumed that governments alone are to be blamed for human rights violations. In addition, a somewhat simplistic notion has emerged that all non-governmental organizations are in favour of human rights. Such simplistic assumptions can lead to seriously wrong responses to tense situations. In many cases, Governments are seeking to find approaches to accommodate all groups on a basis of equality, but are faced with intolerant and sometimes violent actions from several quarters. In cases such as these they may require assistance in finding constructive solutions and to demonstrate the intolerance of the groups which oppose them.

45. The High Commissioner for Human Rights can undoubtedly play a major role in these preventive functions. Much can be learned from the positive experience gained by the Conference on Security and Cooperation in Europe

(CSCE) High Commissioner on National Minorities, who has been able in several cases to help defuse tension and to assist the parties in accommodating each other. It is, of course, essential that such accommodation is based on human rights norms, including the normative system examined in this paper.

46. In cases of open conflict, it is necessary to insist on the application by all parties of the minimum humanitarian standards which are contained in humanitarian law and in human rights law. "All parties" include not only the security forces of the country concerned, but also the non-governmental entities which are opposing them or are fighting one another. They also include international peacekeeping forces wherever they are present. Building on the experience of the International Tribunal on War Crimes in Former Yugoslavia, efforts need to be made to avoid impunity and to ensure that those responsible for serious crimes connected with the conflict are brought to trial.

47. In the processes of post-conflict peacebuilding, efforts should be made to create or strengthen a human rights infrastructure in the country concerned, based inter alia on the normative system outlined in this paper. Lessons should be derived from the experience of human rights components of United Nations actions such as that in Cambodia. The Sub-Commission should study the lessons derived with a view to recommending guidelines for those aspects which fall within its mandate, for subsequent actions of similar kinds.

48. There is an obvious need to strengthen the Centre for Human Rights for it to be able to provide adequate services in these matters, both in terms of research, study and evaluation, and in terms of procedures for action. It is essential in this connection that the Centre be organised in such a way that the interrelationship between the prevention of discrimination and the protection of minorities is properly understood, in order to make adequate action possible.

49. Once the Sub-Commission recognizes its unique position as the only body with the mandate to integrate the concern with discrimination and with minorities, it should elaborate a coherent programme on these issues, which are of burning actuality. It is hoped that the observations made in the present paper, together with the recommendations contained in the study on possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities (E/CN.4/Sub.2/1993/34 and Add.1-4) may help the Sub-Commission in this endeavour.

Notes

1/ See, for example, Robert Kaplan, "The coming of anarchy," in The Atlantic Monthly, February 1994.

2/ For details of the history of the Sub-Commission, see Eider, Asbjørn: "The Sub-Commission on Prevention of Discrimination and Protection of Minorities" in **Alston (ed.)**, **The United Nations and Human Rights**, Clarendon Press, Oxford, 1992.

3/ Meaning the right to self-determination.

4/ General Comment No. 23 (50), concerning article 27 (CCPR/C/21/Rev.1/Add.5, of 26 April 1994).